

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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WT Docket No. 08-165

Petition for Declaratory Ruling to Clarify)
Provisions of Section 332(c)(7)(B) to Ensure)
Timely Siting Review and to Preempt under)
Section 253 State and Local Ordinances that)
Classify All Wireless Siting Proposals as)
Requiring a Variance)
_____)

COMMENTS OF
AIRPORTS COUNCIL INTERNATIONAL - NORTH AMERICA

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Airports Council International-North America ("ACI-NA"), by its attorney and pursuant to Section 1.46(b) of the Commission's Rules, 47 C.F.R. § 1.46(b), hereby submits its comments in the above-captioned proceeding.

An important role of ACI-NA is, in rulemaking proceedings of this kind, to represent the interests of the local, regional and state governing bodies that own and operate the principal airports served by scheduled air carriers throughout North America. ACI-NA member airports are responsible for approximately 95 percent of the domestic and international scheduled airline passenger and cargo traffic in the United States and Canada. The Wireless Association's ("CTIA's") petition requesting that the Federal Communications Commission ("FCC" or "Commission") issue a Declaratory Ruling clarifying provisions of the Communications Act of 1934, as amended, regarding state and local review of wireless facility siting applications, raises important issues of law and policy potentially affecting the interests of all of ACI-NA's members. Although not all of ACI-NA's member airports enjoy direct permitting authority for the construction of towers and transmitters for wireless services located near airports, all of its member airports are nevertheless impacted by the siting of such facilities. ACI-NA appreciates being afforded the opportunity to submit comments on the petition for declaratory ruling filed by CTIA-The Wireless Association,¹ in which CTIA seeks to resolve several open questions relating to state and local governmental reviews of, and decisions with respect to, wireless facility siting applications, including: (1) the time frames in which state and local zoning authorities must respond to such applications; (2) the criteria employed in handling multiple requests for the provision of wireless

¹ CTIA-The Wireless Association®, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket 08-165 (filed July 11, 2008) ("Petition").

telecommunications services in a given area; and (3) the range of requirements imposed on wireless service providers, especially as compared with those applied to wireline service providers in the same geographic area. ²

The Airport's Interest in This Matter

Safety issues associated with the operation of aircraft are regulated and overseen generally by the Federal Aviation Administration ("FAA") under the Federal Aviation Act.³ The protection of the airspace around airports is an important responsibility of the FAA so that obstructions that may cause a hazard to the navigable airspace are prevented. Thus, whether an actual or potential obstruction is possibly caused by the physical location of a telecommunications tower or through a telecommunications frequency interruption, the FAA is responsible for ensuring that aircraft operations are not impaired by such towers or frequencies. In fact, all potential obstructions that could be located on or near an airport must receive approval from the FAA prior to construction. In addition, proposed changes to existing facilities that could create obstructions must likewise be approved.

Even if the FAA finds that planned facilities on airport property do not create an obstruction in navigable airspace over which it has primary jurisdiction, the airport itself may find that certain facilities located on its premises, or that operating telecommunications frequencies cause interruptions which impair the safety of airfield and airport operations. In those instances, state and local zoning authorities, reviewing the unique circumstances of the operations in their locales, may impose certain safeguards and implement zoning restrictions that they deem in the best interest of the residents of those states and localities, as well as those using the services of that particular airport. Since the

² Petition at iii-iv.

³ 49 U.S.C. § 1301 et seq.

operations differ from state to state, locale to locale, and airport to airport, states and localities are in the best position to evaluate their unique circumstances and to balance competing interests of overall airport safety, comprehensive evaluations of the proposed facilities on airfield operations, maintenance of an array of telecommunications operations that will meet the needs of the residents of the area in which new providers submit applications, and to determine what best serves the public interest.

Airport Proprietors and Associated State and Local Zoning Authorities are in the

Best Position To Evaluate the Impact of Telecommunications Facilities

and Frequencies

On or Near Airport Property

ACI-NA has been a strong advocate of allowing airport proprietors and those associated governmental units in their jurisdictions, to evaluate and determine what is in the best interest of maintaining the best level of air services in their communities.⁴ Unless Congress clearly establishes that a federal agency should pre-empt local decision-makers in an area where states and localities have exercised their authority, such as with respect to zoning of certain telecommunications facilities on or near airports, then local authorities should be allowed to act in ways that meet the needs of their communities. Moreover, especially where overall airport safety is at issue, and state and local zoning authorities need time to evaluate information on the impact of tower locations and telecommunications frequencies on airport operations, it is not in the public interest to impose artificial

⁴ For example, In the Matter of Petition for Declaratory Ruling of Continental Airlines, Inc., ET Docket No. 05-247, ACI-NA strongly urged the FCC's Office of Engineering and Technology to deny the Petition for Declaratory Ruling of Continental Airlines, in part, because airports, as unique institutions, should be allowed to make decisions about the provision of wireless networks at their facilities, with due consideration to the unique needs, facility constraints and other factors affecting those served at those airports. ACI-NA Comments dated September 28, 2005 and ACI-NA Reply Comments, dated October 13, 2005.

limitations on the timeframe for a state or local zoning board's action on a wireless tower siting application.

If granted, CTIA's petition would require that state and local zoning authorities act reviewing wireless facility siting applications involving collocation occur within 45 days from submission of the request to the local zoning authority, and that such actions be taken when collocation is not an issue within 75 days of the submission of the request to the local zoning authority. Moreover, a failure to act within the prescribed timeframes would result in the applications being 'deemed granted'. Or, alternatively, a presumption would be established that a wireless carrier is entitled to an injunction ordering the state or local zoning authority to grant the siting application unless the delay could be justified.

The CTIA petition would also bar zoning decisions that have the effect of prohibiting additional providers of wireless telecommunications services in a certain geographic area. Thus, the FCC would become the decision-maker with respect to all decisions involving multiple providers of wireless telecommunications services within a given area, and the single policy of maximizing the number of wireless telecommunications providers in a given community would become the dominant (or possibly the only) issue considered in determining whether wireless telecommunications towers and frequencies should be allowed on and/or near airports. Such an outcome is neither consistent with nor required under the Telecommunications Act of 1996, as CTIA would attempt to stretch the interpretation of that statute. Indeed, as a recent article appearing in *The Urban Lawyer-The National Journal on State and Local Government Law* recognizes:

"Section 332(c)(7) of the TCA does not completely preempt local zoning authority. Rather, it places certain restrictions on the authority of local bodies to regulate the zoning of telecommunications service facilities. Section 332(c) provides that "[e]xcept as provided in this paragraph, nothing in this act shall limit or affect the authority

of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities.”⁵

Moreover, while the Act recognizes that there are limits to a state or municipality’s zoning authority in this area, those limits are carefully spelled out, so that a case by case determination can be made on whether or not those limits have been exceeded. Nothing in the statute suggests that broad categories of ordinances should be disallowed simply because they utilize special characteristics, like a variance, for providers of wireless telecommunications towers in those areas.

Preemption of Local Ordinances and State Laws Without An Evaluation of the Actual Impact on Competition Would Be Overbroad

Similarly, to the extent that the CTIA petition would “preempt local ordinances and state laws that subject wireless siting applications to unique, burdensome requirements, such as those treating wireless siting requests as requiring a variance”,⁶ and conclude that all such ordinances and state laws erect barriers to competition, such a declaratory ruling should be denied. In each instance, the local ordinance and/or state law must be evaluated to determine whether the provision erects a barrier to competition. Indeed, CTIA’s proposed interpretation runs counter to a recent decision of the Ninth Circuit Court of Appeals, Sprint Telephony PCS v. County of San Diego. (9th Cir. En banc, 9/11/08)⁷. There, citing the Eighth Circuit’s and lower court’s critique of the Ninth Circuit’s earlier decision on a local jurisdiction’s ability to impose limitations on wireless services under an evaluation of Section 253(a) of the Telecommunications Act of 1996 (the “Act”) in Auburn

⁵ Robert B. Foster, *A Novel Application: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities under the Telecommunications Act of 1996*, Summer 2008, Volume 40, Number 3, 521-534, at 522.

⁶ Petition at iii-iv and 35-37.

⁷ <http://caselaw.lp.findlaw.com/data2/circs/9th/0556076p.pdf>

v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001), the court noted that in Level 3 Communications, LLC v. City of St. Louis, 477 F.3d 528, 532-33 (8th Cir. 2007), the mere possibility of prohibition on competition is insufficient; a plaintiff “must show actual or effective prohibition” of competition in order to establish that a state or local zoning statute or ordinance is inconsistent with the Act. The Courts of Appeal of the Eighth and Ninth Circuits also cited several recent decisions of the FCC itself that require the actual demonstration of a prohibition of competition, rather than a speculative one.⁸

Moreover, as the law review article in *The Urban Lawyer*, cited earlier recognizes, judicial decisions concerning cases involving challenges of zoning decisions and zoning ordinances involving wireless service providers are not yet settled and raise some puzzling concerns.⁹ It would indeed be inappropriate to make broad pronouncements limiting the types of zoning ordinances that may be implemented without a review of their actual impact on competition and subjecting them to the standards reflected in the Act. What CTIA proposes is a way to circumvent a case by case evaluation of competitive impact by declaring that all state statutes and local ordinances that require a variance in order to operate wireless facilities be deemed impermissible barriers to entry under Section 253(a) of the Telecommunications Act of 1996. A zoning ordinance that pertains uniquely to an airport in a state or locale could conceivably prohibit all such facilities on or near airports except by the issuance of a variance in recognition of the general interference that such facilities and frequencies cause on the airfield and to airport operations. Such an

⁸ See *In re Cal. Payphone Ass’n*, 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation “would have to actually prohibit or effectively prohibit” the provision of services); *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (holding that the two-step *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), analysis applies to FCC rulings).

⁹ Foster, *supra* note 5.

ordinance would not necessarily contravene the 'barrier to competition' standard set forth in Section 253(a) of the Telecommunications Act of 1996, and yet, if CTIA's interpretation were granted, such an ordinance would be preempted. We submit that such a result is neither required under the Act, nor consistent with existing judicial interpretations of the Act.

CONCLUSION

For the reasons set forth herein, ACI-NA submits that CTIA has requested a declaratory ruling under various provisions of the Telecommunications Act of 1996 that could impair the safety of airport and airfield operations throughout the country and are therefore not in the public interest, would preclude state and local airport proprietors and associated governmental entities from making decisions that are in the best interest of the residents of those communities and those using airports serving those communities, would unlawfully preempt the authority of state and local governing bodies with respect to zoning matters in their communities and run afoul of existing judicial and FCC interpretations of the Act. We therefore request that the petition of CTIA be denied in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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